annexation. Taylor *v.* Watkins, 62 Ind. 511; Yater *v.* Mullen, 24 Ind. 277." Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 755.

The decisions of the courts as to what are and are not fixtures are apparently as diverse as the peculiarities of the facts in the different cases that are decided. They are governed largely by the facts in each individual case and one can find authorities to support either side of the controversy. There are certain general tests that have been uniformly applied by the courts. The court in Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, states them as follows: "While some rules of general application have been formulated, in the very nature of the subject each case must in some degree be controlled by the varying circumstances peculiar to it. The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Teaff *v.* Hewitt, 1 O. St. 511, 530; Potter *v.* Cromwell, 40 N. Y. 296; Ewell, Fixt. 21; Tyler, Fixt. 114; McCrea *v.* Bank, 66 N. Y. 489."

In Atcheson, etc., R. Co. *v.* Morgan, 42 Kan. 23, 21 Pac. 809, the court lays down another test, where it says: "It can readily be seen that one of the tests of whether a chattel retains its character or becomes a fixture is the uses to which it is put. If it be placed on the land for the purpose of improving it and to make it more valuable, that is evidence that it is a fixture. The test of whether real estate is benefited by the act of annexation has been repeatedly applied by the courts, to determine whether the chattel annexed became a fixture or not. 11 Alb. Law J. 151; Woolen Mill Co. *v.* Hawley, 44 Iowa 57; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. Rep. 22; Huebschmann *v.* McHenry, 29 Wis. 655; Minnesota Co. *v.* St. Paul Co., note, 2 Wall. 645; Railroad Co. *v.* Canton Co., 30 Md. 347; Wagner *v.* Railroad Co., 22 Ohio St. 563."

This latter test might have been urged in support of the contention that such soil was not a fixture. Certainly the placing of the soil and rock on the land was not considered a benefit by the parties themselves as evidenced by the payment by the road for the privilege.

FIELDS *v.* VIRGINIAN RY. CO.

March 13, 1913.

[77 S. E. 501.]

1. Master and Servant (§ 213*)—Liability for Injuries—Assumption of Risk.—Plaintiff was employed in making an excavation; the method being to cut into the bottom of the face of the embankment about two feet along its whole front, then make a trench along the top about two feet from the face, and then with crowbar break off the front of the embankment thus cut under. While plaintiff was engaged in undercutting the embankment, and other employees were cutting the trench on top of the embankment, the face of the em-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

bankment unexpectedly gave way and injured plaintiff. Plaintiff was a man of mature years and of ordinary intelligence and capacity, and knew how the work was being done. Held, that the risk of such injury was assumed by plaintiff; it being open and obvious and incident to the work as it was being done.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.*]

2. Appeal and Error (§ 1068*)—Review—Harmless Error.—Where no other verdict than that found could have been sustained on the evidence, the erroneous giving or refusing of instructions was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3. Master and Servant (§§ 101, 102*)—Liability for Injuries—Unsafe Place to Work.—It is the duty of an employer to use ordinary care and diligence to provide a reasonably safe place in which the employee is to work, considering the character of the work to be done; and he is liable for injuries resulting from his failure to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

4. Master and Servant (§ 155*)—Liability for Injuries—Warning Servant.—An employer is not required to warn an employee of an open and obvious danger of which he knows, or could know by exercising ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

5. Master and Servant (§ 278*)—Liability for Injuries—Sufficiency of Evidence.—Plaintiff, while employed in undercutting an embankment, while other employees dug a trench on the top of the embankment preparatory to prying the face of the embankment loose, was injured by the face of the embankment giving way. The evidence showed that this was the usual and ordinary method of doing the work, and that the fall of the embankment was wholly unexpected. Held, that the evidence did not show negligence on the part of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

Error to Circuit Court, Charlotte County.

Action by Pizarro Fields against the Virginian Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No Series & Rep'r Indexes.

Volney E. Howard, of Lynchburg, and *Carrington & Chermcide,* of Charlotte C. H., for plaintiff in error.

H. T. Hall, of Roanoke, *G. A. Wingfield,* of Norfolk, and *Thos. E. Watkins,* of Charlotte C. H., for defendant in error.

BUCHANAN, J. This is an action of trespass on the case in tort to recover for personal injuries suffered by the plaintiff in error, Pizarro Fields, whilst in the service of the defendant in error, the Virginian Railway Company.

[1] It appears that the defendant company, at the time of the wrong complained of, was engaged in excavating an embankment near its track upon which to erect a station or depot. The work was being done by a gang of hands (the exact number is not shown), of which one Hurt was foreman. The said embankment was very slight near the railroad track, but increased in depth as the work proceeded until it was from eight to twelve feet deep where the plaintiff was injured. When the excavation was commenced, as the cutting was slight, the work was done by digging the dirt down with picks, to be removed by shoveling into carts; but as the work progressed the embankment increased in depth until there was sufficient face to its slope to require or justify another method of excavation. That method was to cut into the base or bottom of the face of the embankment about two feet in depth under and along its whole front, and then make a trench along the top of the embankment about two feet from and parallel with the face of the embankment, then with a crowbar to make holes at intervals in the bottom of that trench its entire length, and afterwards, by the use of the crowbars, to prize down or break off the front of the embankment which had thus been cut under. Until the trench was completed and the holes had been made in the bottom of it, the employees at the base of the embankment continued to work. When everything was ready for prizing off the face of the embankment thus prepared for falling, warning was given to the employees below, so that they could get out of danger.

At the time the plaintiff was injured, he and another employee were engaged in under-cutting the embankment at its base, as above described. Immediately prior to this the foreman, who had gone on top of the embankment, had called one of the employees and put him to work in cutting a trench about two feet from and along the face of the embankment. As this employee opened up that trench, the foreman was making holes in the bottom of it, thus getting ready, when the trench was completed and the holes were made, to prize off the face of the embankment and throw the dirt down, to be carried away in the carts. Before the trench had been completed or more than two or three holes had been made in the bottom of it, the face of the embankment, un-

expectedly to all, gave way, carrying down the foreman and the employee at work in the trench. As soon as it was discovered that the earth was giving way and was going to fall, the foreman called out to the employees engaged in under-cutting and in shoveling into the carts to "get out of the way." All did so without injury, except the plaintiff, upon whom the dirt from above fell, inflicting the injury complained of.

Upon the trial of the cause there was a verdict in favor of the defendant, upon which the court entered judgment. To that judgment this writ of error was awarded.

[2] The errors assigned are based upon the action of the court in giving and refusing instructions. As the case made by the evidence appears to us, it is unnecessary to consider the propriety of the action of the court in giving and refusing instructions, since no other verdict than that which was found could have been sustained upon the evidence.

While the plaintiff had only been in the service of the defendant a day or two, he vas a man of mature years and of ordinary intelligence and capacity. He knew how the work in which he was engaged was being done, and that there was some risk in doing it in that manner. The risk was open and obvious and incident to the work as it was being done.

[3, 4] It is the duty of the master to use ordinary care and diligence to provide a reasonably safe place in which his servant is to work, considering the character of the work to be done; and for a failure so to do he is liable for resulting injuries to the servant. The servant, however, assumes all the ordinary risks of the service in which he is engaged. He also, as a general rule, assumes all risks from causes which are known to him, or which should be readily discovered by a person of his age and capacity in the exercise of ordinary care. The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment. Robinson *v.* Dininny, 96 Va. 41, 42, 30 S. E. 442, and authorities cited; Jacoby Co. *v.* Williams, 110 Va. 55, 61, 62, 65 S. E. 491; American Locomotive Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991; Southern Ry. Co. *v.* Foster's Adm'r, 111 Va. 763, 767, 768, 69 S. E. 972, and authorities cited; Cabin Branch, etc., Co. *v.* Hutchinson's Adm'x, 112 Va. 37, 70 S. E. 480, Ann. Cas. 1912D, 93.

[5] It is conceded (and if it were not it is clearly established) by the uncontradicted evidence that the manner in which the defendant was doing the work of excavation was the usual and ordinary method of doing such work. It further appears that the breaking away of the face of the embankment at the time it fell

upon the plaintiff was wholly unexpected. The evidence does not show that the plaintiff's injury resulted from negligence on the part of the defendant.

The judgment complained of must be affirmed.

Affirmed.

UNITED STATES EXPRESS CO. *v.* CITY OF PORTSMOUTH.

March 13, 1913.

[77 S. E. 506.]

Commerce (§ 33*)—Interstate Commerce—Transactions Not Constituting.—An ordinance of Portsmouth, Va., imposing a license tax on express companies engaged in transporting packages, etc., to other points in the state, does not violate the federal constitutional provision which gives Congress power to regulate interstate commerce, as to an express company whose intrastate shipments are carried by boat to Washington, D. C., and transferred there to trains.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

Error to Circuit Court of City of Portsmouth.

The United States Express Company was convicted of violating an ordinance of the City of Portsmouth, and brings error. Affirmed.

Thos. W. Shelton, of Norfolk, and *Frank H. Platt,* of New York City, for plaintiff in error.

John W. Happer, of Portsmouth, for defendant in error.

BUCHANAN, J. The plaintiff in error, the United States Express Company, was convicted of violating an ordinance of the city of Portsmouth imposing a license tax on express companies carrying on business in the city.

The ordinance imposing the tax is as follows: "Every express company, or person, firm or corporation engaged in the business of transporting packages parcels or other property in the city of Portsmouth, as the original point of delivery, to be delivered or carried to a point outside of the city, but within the state of Virginia, shall pay for doing such business but not including any business for delivering parcels, packages or other property to the city of Portsmouth to be delivered at a point without the state of Virginia, or of receiving parcels, packages, or other property in the city of Portsmouth, to be delivered with-

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